

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WENCESLAO HERNANDEZ

Claimant

VS.

MONFORT, INC.

Respondent

Self-Insured

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Docket No. 208,012

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Pamela J. Fuller's October 5, 1998, Decision and October 7, 1998, Order Nunc Pro Tunc. The Appeals Board heard oral argument by telephone conference on April 28, 1999.

APPEARANCES

Claimant appeared by and through his attorney, Michael L. Snider of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Terry J. Malone, of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Decision.

ISSUES

The Administrative Law Judge found claimant injured his right upper extremity, including his shoulder, while working for the respondent. She awarded claimant a 16 percent permanent partial disability for a scheduled right arm and shoulder injury. Claimant has appealed and claims, in addition to the right upper extremity and shoulder injury, he also suffered injuries to his left shoulder, low back, and neck. Accordingly, claimant requests the Appeals Board to award claimant permanent partial disability benefits based on a body as whole instead of a scheduled injury. Respondent has returned claimant to accommodated employment at a comparable wage. Therefore, work disability is not an issue.

Conversely, respondent contends the Administrative Law Judge's Decision that limited claimant to a scheduled injury was correct and should be affirmed. Respondent asserts the claimant only proved his right rotator cuff tear was caused by his work activities. Respondent argues claimant failed to prove his work activities either caused injury or aggravated preexisting conditions in claimant's left shoulder, neck, and low back.

FINDINGS OF FACT AND Conclusions of Law

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds the Administrative Law Judge's Decision should be affirmed.

FINDINGS OF FACT

- (1) Claimant alleges he sustained injuries to both shoulders, upper extremities, neck, and low back while performing repetitive work activities for the respondent between August 1995 and February 22, 1996.
- (2) During this period of accident, claimant was employed in a job of pulling clods. This job required claimant to work with a knife in his dominate right hand and a hook in his left hand. He hooked and then dragged 50 to 60 pound pieces of meat off a moving conveyor belt to a table where he cut the meat with a knife. After the meat was cut, he was required to twist around and throw the meat into a container behind him.
- (3) Claimant started having pain and discomfort in his shoulders and upper extremities sometime during the month of August 1995 that continued to worsen through the month of October 1995. Claimant testified that during this period of time the respondent had lost employees because they were removed from the plant by the immigration service for being illegal aliens. As a result, claimant's work load increased causing the pain and discomfort.
- (4) On November 1, 1995, because of the worsening symptoms, claimant went to respondent's Health Service Department with complaints of soreness and pain in his right hand and thumb. At that time, respondent referred claimant to the company's physician, Myron J. Zeller, M.D.
- (5) Dr. Zeller first saw claimant on November 6, 1995, with complaints of pain in both shoulders and upper extremities. The doctor's impression was strain of both shoulders and the upper extremities. He prescribed pain medication, placed claimant in a physical therapy program, and had claimant undergo a nerve conduction study. Claimant's work activities were restricted from hand intensive labor that included working with hooks and knives.

(6) Claimant's left shoulder and upper extremity improved but his right upper extremity and shoulder did not. Dr. Zeller then referred claimant for further examination and treatment to orthopedic surgeon C. Reiff Brown, M.D.

(7) Dr. Brown saw claimant on December 11, 1995. After taking a history from claimant and performing a physical examination, Dr. Brown diagnosed severe tendonitis of both shoulders, tendonitis of the right hand, and a complete right rotator cuff tear. He ordered an MRI scan to verify the rotator cuff tear diagnosis. Claimant remained at work on light work duty.

(8) The MRI scan verified a full right rotator cuff tear. Dr. Brown then referred claimant to orthopedic surgeon Chris Miller, M.D., for a surgical opinion.

(9) Dr. Miller saw claimant for the first time on December 26, 1995. After he examined claimant and reviewed the MRI scan, the doctor scheduled claimant for surgery. On February 22, 1996, Dr. Miller surgically repaired claimant's right rotator cuff.

After the surgery, claimant was released to return to work on March 4, 1996, with restrictions to left hand work only. Claimant was also placed into an extensive physical therapy program. Because claimant continued to complain of right arm pain, Dr. Miller recommended that claimant undergo an MRI examination of his cervical spine. The June 13, 1996, MRI examination revealed a suggestion of a subligamentous disc herniation at C5-6 on the right and a bulging annulus at C4-5. Dr. Miller referred claimant to Kris Lewonowski, M.D., another orthopedic surgeon in his group, who specialized in the treatment of spinal injuries.

(10) Dr. Lewonowski had claimant undergo another EMG study that found no cervical radiculopathy of the right upper extremity. The study did reveal evidence of mild left carpal tunnel syndrome as well as some peripheral neuropathy and suggested ulnar nerve irritation at both elbows. Dr. Lewonowski suggested that another orthopedic surgeon, Tyrone D. Artz, M.D., who specialized in hand and joint surgery should see claimant.

(11) Respondent's insurance carrier, however, did not authorize Dr. Artz to treat claimant. The insurance carrier, instead, referred claimant to another orthopedic surgeon, Gary M. Kramer, M.D.

(12) Dr. Kramer examined claimant on October 22, 1996. At that time, claimant had complaints of right-sided neck and arm pain. Dr. Kramer's diagnosis was symptom magnification and status post right rotator repair. The doctor's clinical findings correlated with the EMG studies that found no right arm radiculopathy. The doctor opined that the MRI scan that showed a herniated cervical disc was a false positive because there was no clinical or EMG corroboration. Dr. Kramer opined that the reason for claimant's continued right arm pain was failed rotator cuff surgery that occurs in 30 percent of injured workers who undergo rotator cuff repair.

(13) During the time claimant was seeing Dr. Lewonowski and Dr. Kramer for his continued right arm and shoulder symptoms, he also continued to be treated by Dr. Miller for the post rotator cuff surgery. On October 4, 1996, Dr. Miller found claimant had met maximum medical improvement in reference to the rotator cuff surgery. During that visit, Dr. Miller rated and released claimant from his care. In accordance with the AMA Guides, Dr. Miller assessed claimant with a 29 percent permanent functional impairment of the right upper extremity.

(14) In a letter to respondent dated August 5, 1996, Dr. Miller had stated that he believed claimant's continued right shoulder pain was related to the herniated disc found in claimant's cervical spine. In that letter, Dr. Miller went on to state "It is more likely than not related to his work injury." But, during Dr. Miller's deposition testimony, he deferred any opinion in regard to claimant's cervical spine injury to Dr. Lewonowski. He testified he did not have an opinion of whether or not claimant's continued right upper extremity and shoulder pain was related to his herniated cervical disc or whether the herniated disc was related to a work injury.

(15) At the request of the respondent, claimant again returned to see Dr. Brown on July 29, 1997. The first time that Dr. Brown examined claimant on December 11, 1995, claimant's only complaints were to both shoulders and his right hand. But this time, claimant complained of pain across the right side of his low back, pain on the left side of the scapula area, and across the shoulders upward into the back of the neck. Also, claimant complained of numbness across the back of his shoulders and numbness in his low back that continued down the back of his right leg. Claimant told Dr. Brown he was constantly in pain that increased with activity and in cold environments. Dr. Brown did not find that claimant related a history of an accident at work that would have caused claimant's continued unexplained right shoulder discomfort and low-back pain. Dr. Brown opined the absence of evidence of radiculopathy, as determined by the EMG studies, completely ruled out claimant's herniated cervical disc as the cause for claimant's right shoulder and arm symptoms.

The doctor opined that claimant's cervical disc difficulties, as demonstrated by the MRI scan, represented an asymptomatic cervical disc herniation that 30 percent of the people by the age of 40 have and they are completely without symptoms. Dr. Brown referenced the AMA Guides to the Evaluation to Permanent Impairment, Fourth Edition, page 100 for that particular medical research finding. The doctor further testified he was in complete agreement with Dr. Kramer's opinion that claimant's disc herniations were asymptomatic and not associated with claimant's vague non-anatomic and exaggerated symptoms. He believed that claimant's symptoms in both his neck and low back were more likely the result of the normal aging process. Dr. Brown went on to opine that there was no relationship between claimant's present symptoms in the neck and low back to any particular work injury.

(16) Later, on January 5, 1998, at the request of claimant's attorney, Dr. Brown assessed claimant with a 16 percent right upper extremity functional impairment as a result of the right rotator cuff tear, tendonitis, and tendon rupture involving claimant's right and middle fingers. He utilized the AMA Guides, Third Edition (Revised) in determining the functional impairment rating. The doctor did not find that claimant had any permanent functional impairment as the result of his left shoulder, neck, or low back complaints.

(17) At claimant's attorney's request, P. Brent Koprivica, M.D., board certified in occupational and emergency medicine, examined and evaluated claimant. Dr. Koprivica saw claimant on one occasion, October 18, 1997. The doctor had been provided with claimant's previous medical treatment records and diagnostic studies. At that time, claimant complained of significant right side ongoing neck pain that continued into his right shoulder. He had right shoulder weakness to the point he could not raise his right arm normally and could not repetitively reach comfortably with his right arm. Claimant also had complaints of intermittent numbness involving the fingers of his right hand. Additionally, he had ongoing low-back pain. Although Dr. Koprivica did not find claimant a malingerer, he did find from a physical standpoint that claimant's physical impairment was exaggerated.

Dr. Koprivica opined claimant's repetitive work activities that he preformed while working for the respondent were sufficient to result in a cumulative injury. These repetitive work activities resulted in permanent injuries to claimant's right upper extremity, including the shoulder. These repetitive activities also, at least, aggravated a significantly abnormal cervical spine and preexisting lumbar spine condition. The doctor found that claimant's left shoulder tendonitis and impingement syndrome had resolved and did not present any ongoing permanent impairment.

Utilizing the AMA Guides, Third Edition (Revised), Dr. Koprivica found claimant had permanent functional impairment resulting from his right upper extremity, including the shoulder; cervical spine; and lumbar spine of 43 percent. But he discounted the 43 percent opinion to 30 percent because of claimant's chronic pain behavior that exaggerated his permanent functional impairment.

(18) Although claimant testified he made complaints to respondent and his treating physicians of low-back pain as early as August of 1995, there is no evidence in the record that claimant made such complaints until he submitted a note to respondent's Health Service Department on September 16, 1996.

(19) The Appeals Board also adopts as its own the findings and conclusions contained in the Administrative Law Judge's Decision that are not inconsistent with the findings contained in this Order.

CONCLUSIONS OF LAW

(1) In a workers compensation case, the claimant has the burden to prove by a preponderance of the creditable evidence his right to an award of compensation.¹

(2) A claimant who suffers a scheduled injury and a whole body injury in the same work-related accident is entitled to permanent partial general disability benefits as provided for in K.S.A. 44-510e(a).²

(3) The Appeals Board concludes that claimant proved he suffered a work-related scheduled right upper extremity and shoulder injury. But he failed to prove he also suffered a work-related neck or low-back injury.

(4) The Appeals Board finds the most persuasive medical evidence contained in the record are the opinions of orthopedic surgeons Dr. Brown and Dr. Kramer. Those two physicians both found that claimant's repetitive work activities had not cause or aggravated claimant's cervical disc or lumbar spine conditions. Both physicians found claimant was a symptom magnifier because his complaints did not correlate with the MRI scan finding of a herniated C5-6 disc. Additionally, both physicians were of the opinion, since the EMG studies did not indicate right arm radiculopathy, the herniated cervical disc was not the cause of claimant's continuing right arm and shoulder complaints. The more plausible explanation for claimant's continuing right arm and shoulder complaints was failed rotator cuff surgery.

(5) In regards to claimant's low-back complaints, the record does not contain any documentation of those complaints until September 16, 1996, which was after the alleged period of accident from August 1995 through claimant's date of rotator cuff surgery of February 22, 1996. No physician other than Dr. Koprivica related claimant's lumbar complaints to his work. In fact, Dr. Kramer's examination of claimant does not note any low-back complaints. Additionally, Dr. Brown believed claimant's low-back condition was degenerative and had no relationship to claimant's work.

(6) The Administrative Law Judge computed the award based on an accident date of August 19, 1995. In a hearing held before Special Administrative Law Judge William Morrissey on April 28, 1998, claimant alleged a period of accident from August 1995 through the date of claimant's right shoulder surgery that claimant indicated took place on May 17, 1996. But the record indicates the surgery took place on February 22, 1996. The date of accident was not made an issue by either party on appeal. Therefore, the Appeals Board adopts the Administrative Law Judge's August 19, 1995, accident date.

¹See K.S.A. 44-501(a) and K.S.A. 1995 Supp. 44-508(g).

²See Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976)

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Pamela J. Fuller's October 5, 1998, Decision and October 7, 1998, Order Nunc Pro Tunc should be, and is hereby, affirmed in all respects.

All other orders contained in the Decision are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Wichita, KS
Terry J. Malone, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director